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**IMPLEMENTATION OF SOCIAL COURTS LEGISLATION
IN THE YAYA GULELE WEREDA**

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ADDIS ABABA, ETHIOPIA

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**IMPLEMENTATION OF SOCIAL COURTS LEGISLATION
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Basic concept of property

The term property has a number of meanings. The word can have legal, popular, economic or even philosophical. No comprehensive definition may be given to it. Therefore, it becomes necessary to consider the different senses in which it is used in order to understand its legal application. For philosophers, like Hobbes and John Locke, the term property includes all legal rights of a person. Locke for instance said that every individual has a right to preserve 'his property that his liberty, and estate how ever one can easily see that this is in its widest sense of the term property as it even considers right emanating from family relation. Therefore cannot be acceptable in law. Because there is no law, that provides civil, political, and family right as property. In law legal rights are divided as personal and proprietary. Personal rights are those legal right, which cannot be expressed in terms of money^{1 2}.

As they cannot have monetary value monetary value they cannot be governed under Property Law Pecuniary rights however are those right that can be expressed in terms of money ³. As a result, they have monetary value and fall under laws governing property. In these sense, therefore they proprietary and not legal right which are personal⁴. Such scholars again sub divided property right into right in rem and right in personam.

Right in rem are those proprietary rights of a human being that can be claimed against the whole world. Such rights emanate from things, also

1. public service of Oromia, (DECO) Distance Education coordination office, law of land and property page----- s

2. Ibid

3. Ibid

4. Ibid

called goods, which are the objects of property⁵. For other scholars property refers only to right in personam. Right in personam are those rights which can only be claimed against specified individuals. (source?)

Real Rights

A real right is a right over an identifiable asset or fund of assets. There are three main forms of real rights namely ownership, possession and equitable charge. The main significance of real rights is that they service the bankruptcy of the person against whom they are asserted, so the asset can be held against or reclaimed from his trustee in bankruptcy?.

Personal Right

Personal right is a legal right which could be exercised against a specific person or group of persons. In some ways, the legal form work for personal property ownership is similar to that for real property^{5 6 7 8 9}. For example personal property can be subject to the same categories of concurrent ownership as real property including tenancy in common and joint tenancy, as well as marital co-ownership categories such as tenancy by the entities and regulating these types of co-ownership as essentially the same for personal property as real property⁹.

In addition, a creditor can acquire a voluntary security interest in an item of personal property that is similar to the interest created by real property mortgage. The debtor retains title to the property, but the

5. Ibid

6. Ibid

7. Ibid Page 5

8. ID

9. Ibid page 7

creditor with such security interest owns an interest that serves as security until the debt is paid¹⁰.

IV . THE DIFFERENCE BETWEEN PERSONAL AND REAL RIGHT.

- ◆◆◆ The Personal right is regulated by law of obligation or law of contract in book 4 of Ethiopian Civil Code. What real right is regulated by law of property (goods) in book 3 of Ethiopian Civil Code.

- ◆◆◆ Personal right is imposed against individual for the exercise rights and obligations through contract Art. 1675 as nobody enters into a contract without his consent¹¹. Real right is not imposed by the personal himself because the law of property innovate from the law.
- ◆◆◆ In personal right the number of against duty bearer is definite. The minimum numbers is two the person can know the duty bearer in advance¹². In real right the number of duty bearer is are indefinite.
- ◆◆◆ In real right the nature of the obligation is negative, This means all people abstain or refrain to do some act on the property of another. What in personal right the nature of obligation is positive¹³. Real right exists with specific or determined things specific things means the law decide the quality of thing specifically.

10. ID

11. Ibid page 5

12. Supra at note 1 page 492

13. Ibid page 493

- ◆◆◆ Personal rights don't give you the right t to follow or peruse the property because the right is emanated from contract. The buyer can't oblige the seller to sell at better price than the previous one even if they have a contract as provided in Article 3085 of the Ethiopian Civil Code. On the other hand real right gives you the right of follow or peruse. The creditor can follow

to oblige the last person, even if he didn't lend or give him the good directly because his creditor is holding or passing the property without his will¹⁴.

◆◆◆ Personal right does not give you a preferential right because the person has no real right on the goods he is selling though real from bank and money other individuals some amounts of money if he is becoming insolvency one off the creditor has a preferential right among the creditors according to registration etc¹⁵ see art. 3076.

◆◆◆ Personal right is for limiting your liberty or action. For instance when a doctor enters into a contract with his patient, he is obliged to be there at specific time. He is limited not to carry out his personal activity. The limitation occurred due to contractual agreement¹⁶.

14. Ethiopian Civil Code article 3085 emphasis add

15. Ethiopian Civil Code article 3076

16. Supra at note page 25

Chapter One

Mortgage

1. Definition and concepts of Mortgage

There is no uniform definition for the term ‘Mortgage’. It is a legal concept that lacks absolute clarity. For purposes of comparison we need to see the various definition of the term provided by different authors.

Black's law dictionary defines mortgage as follows:-

A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may rise to pecuniary liability ¹⁷.

A similar definition, with a similar essence is also forwards by Roy Good that reads “*a mortgage is a transfer of ownership to the creditor by way of security up on the express or implied condition that the*

asset shall be reconveyed to the debtor when the sum secured as been paid”^{17 18}.

For Islamic law mortgage has different definition from the above definition. This is because Sharia Law of Islamic religion prohibits the payment or receipt of interest which means that practicing Muslims cannot conventional mortgages ¹⁹. Real estate is far too expensive for most people to buy outright using cash; Islamic mortgages solve this problem by having the property change hands twice. In one variation the bank will buy the house outright and then act as a landlord. The home buyer, in addition to paying rent, will pay a contribution towards the purchase of the property. When the last payment is made the property changes hands ^{20 21}.

17. Henry Campbell, Black's Law Dictionary 6th edition page

18. Roy Good commercial law second edition Penguin Books publish England page 644

19. [http://wikipedia.org/wiki/mortgage loan3/8/2008](http://wikipedia.org/wiki/mortgage_loan3/8/2008) 2:00pm

20. ID

From the above mentioned and other similar definitions it could be concluded that with certain exception, property susceptible to mortgage is an immovable. Article 3047 (1) of Ethiopian Civil Code in similar way states that a mortgage may charge an immovable only, but with a qualification under sub article 2 when it says movables as well could be mortgaged in certain circumstances.

The parties involved in a contract of mortgage are two they are mainly the mortgagee and the mortgage or the party to whom a transfer of immovable property in mortgage is made is called the mortgagee or, the transferee is a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage money and the instrument by which the transfer is effected is called mortgage deed

²¹.

Distinction between Mortgage and Pledge

As it is true with pledge, mortgage belongs to the category of real security in that the security given for the performance of the principal obligation

is a certain type of property. The role mortgage is playing in the business world is immense. It can be said that the emergence of mortgage as a security device was to fill a gap where other security devices, for example pledge, were found out to be inconvenient.^{21 22}

To start with, mortgage is “----- a real security which without presently dispossessing the owner of the property hypothecated, permits the creditor at the due date to take it over and have it sold in who so

21. Goyaa at sighted page 294

22. Harka Haroye, pledge right and duty, senior thesis (AAU) unpublished page4.

Hands it is found, and to get paid from the proceeds by preference to the other creditors. Thus, as this definition makes it clear, in mortgages the debtor is not dispossessed of the mortgaged property whereas dispossession of the debtor is an essential requirement in pledge, though this requirement has numerous qualifications and exceptions. Furthermore, in pledge the title in property remain with the pledgor ²³, whereas “ in mortgage there is, in form, a transfer of the legal title to the creditor or the mortgagee as a security for the performance of the mortgage ----- debtor’s obligation”. As it is true with pledge, mortgage could arise by the agreement of the parties but it could as well arise by the operation of the law, as for example, the wife’s mortgage on the property of her husband due to his indebtedness to her²⁴.

Furthermore, mortgage could arise by the decision of the court (which is commonly called judicial mortgage), as for example, where the immovable property of the judgment debtor is mortgaged to execute the decision of the court. To this end, Art. 3041 of the Ethiopian civil code provides that mortgage could arise from the law or a judgment or by the agreement of the parties.

The other area of difference between pledge and mortgage is the one concerning the type of property which could be the subject matter of these two auxiliary contracts. Planiol observed “during more than three centuries (from the 16th to the middle of the 19th century) the mortgage on movables has been abolished in France. Still today, in spite of the creation of several mortgages on movables the security of a mortgage creditor is generally on an immovable^{23 24 25}

23. Ibid page 5

24. ID

25. ID

From this it could be concluded that with certain exceptions, property susceptible to mortgage is an immovable. Art 3047 (1) of the Ethiopian civil code provides that a mortgage may charge an immovable only; but with a qualification under sub article 2 that movables as well could be mortgaged in certain circumstances ²⁶.

These categories of movables which could be used as subjects of mortgage are those movables which for the purpose of the laws are immobilized by their nature or by destination. Land and buildings are immovable par excellence but certain things, though movables are deemed to be immovable simply because they are or made to be part and parcel of the immovable property. Thus, “standing crops and fruits of trees not gathered and trees before they are cut down are immovable in the sense that they are part of the land to which they are attached. In this regard what art 1133 (1) of the civil code provides is similar with the above assertion in that it provides that trees and crops shall be deemed an intrinsic elements of the land until they are separate there from ²⁷.

On the other hand, immovable by destination are things movable by their nature but are classified as immovable not only because of their close association with an immovable property but for their economic expediency. Types of property which fall under this category are “cattle intended for cultivation, implements of husbandry, seeds, plants fodder

manure, bee hives ----- ²⁸. Art 1136 of the civil code, though apparently seems to define accessories, content-wise it provides for

26. Supra at note 22 page 5

27. ID

28. ID

immovable by destination. It is not only the above category of movables which are by the operation of the law, deemed to be immovable and thus are made subjects of mortgage.

By virtue of art 3 of the Ethiopian Maritime Code a ship is movable property, nevertheless, as Arts 30 - 40 of the same code provide, they are subjects of mortgage. Furthermore, according to art 124 of the Ethiopian Commercial Code a business is an incorporeal movable consisting of all movable property but still 171 - 193 of the same code provide, it as is mortgagable ²⁹.

The other area of difference between pledge and mortgage is the one concerning the formality of these two contracts. Generally, it is held that as between the parties the contract of pledge does not require a written formality whereas the contract of mortgage does³⁰.

As far as the Ethiopian law is concerned, Art 2828(2) of the Civil Code provides that the contract of pledge would be in writing if the amount of the debt secured by pledge exceeds five hundred Ethiopian dollars, whereas Art 3045(1) of the same code provides that unless the contract of mortgage is made in writing it shall be of no effect. In addition to this, as it is provided under Art 3052 of the civil code, the act of mortgage shall not produce any effect unless it is registered in the registry of immovable property at the place where the immovable mortgaged is situated³¹.

29. Supra at note 22 page 6

30. ID

31. ID

In pledge, even in circumstance where the contract of pledge has to be in writing. (If the amount secured by pledge exceeds five hundred

Ethiopian dollars) there is no requirement of registration. This is rigorous formality requirement in the case of the contract of mortgage and the absence of it

In pledge is there to signify one major point, that is, under the contract of pledge “the pledge is made effective against third persons by the pledged property being taken away from the pledged and put in the possession of the pledge, whereas the conventional mortgage is made effective against third persons by recordation in the public records ³². If its viable effect is desired, has to fulfill additional requirement apart from the written form and registration. As it is provided under art. 3048(1) and (2) of the civil code, the act creating the mortgage shall clearly specify the immovable mortgaged, its location, its nature, and where appropriate, the number of the immovable in the cadastral survey plan. It goes without saying that there is no such formality in the contract of pledge. ³³.

In summary, it could be said that mortgage is much preferable to pledge in one respect that is it does not create inconvenience in dispossessing the debtor. In its turn, pledge is generally considered preferable to mortgage because of its simplicity and its wider range of applicability ³⁴. be that what it may, they have similarities as well. For one thing they belong to the category of real security and for the other they are auxiliary transactions. Needless to say, because both of them are contracts, they share in common so many elements necessary for any viable valid contract ³⁵.

32. Supra at note 22 page 6

33. ID

34. ID

35. ID

1.1.2 Requirement for Contracts of Mortgage

1.1.2.1 Form

A contractual mortgage as any contractual obligation has to meet the general requirement for a valid contract. Besides the general requirements, the Ethiopian Civil Code stipulates certain special requirements, on section of mortgage¹.

Under Ethiopian law, form is not a requirement save in situations where the law so prescribes or the parties agree to this effect². Clark defines the term "form" as "some peculiar solemnity attaching to expression of agreement for the including or excluding of certain subject matter"³. Therefore, form is not an agreement of parties solemnity is, the family established by law to render a contract ... valid⁴. Hence, formality (form) must be understood to mean conditions that are required by law for making valid contract by being attached to the agreement of parties.

As a general rule, contractions have freedom of form for concluding valid contract. They can conclude the contract in whatever manner as it suits circumstance. The general freedom for formality requirement can be understood from Article 1681(1) of Ethiopian Civil Code which states, "Offer or acceptance may be made orally or by a conduct ..." Art. 1678(c) of the code indicates that form is conditional element of contract. Therefore, as a general rule contractants are at liberty to conclude their contract in whatever manner they like.

However, this principle holds exception. Some laws expressly prescribe certain formalities to be observed by contract in order to create a valid contract.

Unless they follow what law requires, the contract will not be guarded by law, such form shall be observed⁵. Articles 1721-1729 of the Civil Code

¹ ID

² David Rene, Commentary on contract in Ethiopian Law (1973) page 32.

³ Clark W. M Hand book of the law of contract 4th edition page 65

⁴ Black cited at note 12 page 62.

⁵ Krzeczunowicz George, Formation and effects of contract in Ethiopian Law (1983) page 65.

deal with formalities in which parties as the contract should comply with.

If the law or agreement of the parties provides that the contract must be concluded in particular form, failure to observe that form results in the invalidation of the contract. Thus, such requirement is mandatory, and cannot be set aside by the parties, of the Ethiopian Civil Code provides that

Where a special form is prescribed by law and not observed there shall be no contract but a mere draft of a contract⁶.

Thus contracts concluded without complying with this prescription or rule are not merely unenforceable, but are of no effect, null and void. Cheeseman supports this view saying that, even if some elements that are necessary for the formation of valid contract are met, the contract cannot be valid unless it meets certain formalities⁷ in the same way as in the case of absence of expressed consent or effective object. So where there is a legal provision or agreement of the parties to this effect, the requirement is for validity of the contract and not simply for the purpose of proving it⁸. Art 3045(1) of the Civil Code lays down the principle that a contract or other agreement creating a mortgage will be of no effect if it is not made in writing. This provision clearly made writing a validity requirement for contract of mortgage.

Any contract to be in writing must be supported by special document signed by the parties to the contract⁹. In addition to this there is a requirement that a contract required to be in writing must be attested by two witnesses. We discuss it about this essential requirements of the law into consider Article 3045(1) of Civil Code can not be satisfied if the parties to a contract of mortgage produce alter they have exchanges and that indicates their agreement¹⁰.

⁶ Ethiopian Civil Code Article 1720(1)

⁷ Ibid emphasize add?

⁸ David at sighted page 32

⁹ Supra at note 21 page 95

¹⁰ ID

1.1.2.2 Claim secured

This requirement is provided under Ethiopian Civil Code Article 3046,

Any claim may be secured, even a future, conditional or contingent one.

On the same Article sub (2) it may be created or used to secure claim to order or bearer¹¹.

1.1.2.3 Identification of immovable mortgaged

As set out under Article 3048 for the mortgaged security to work the immovable must be clearly specified. The article insists in particular on the complete address and cadastral references. Where no cadastral survey plan exists, at least two boundaries must be given¹².

1.1.3 Right of Mortgagee

In contract the obligation one party owes to the other. For instance in contract of sale, the obligation of a seller is delivery of the article sold where the obligation of the buyer is payment of purchase price. Hence, the object of contract in sale contract is either delivery of article sold or payment of purchase price. Therefore, the right and duty of contract is the most essential element that is required for the existence of contract.

Right and duties are arising from the contract or agreement of the parties, or law, will, or judgment though any contract can follow right and duty¹³.

This is supported by Ethiopian Civil Code which is provided as follows under its Article 1675 which defines contract as

A contract is an agreement whereby two or more persons as between themselves create, vary or extinguish obligation of a proprietary nature.

Hence contract is the source of obligation between or among parties to the contract according to their agreement. To be a valid contract the

¹¹ ID

¹² Ibid page 97

¹³ Mertizer, Business Law and Environment page 608

contract has to meet the fundamental elements that means, consent, capacity object and form if any¹⁴.

When by fulfilling those formalities a valid mortgage is created, the mortgagee-creditor can demand payment of the debt within the agreed period¹⁵.

1.1.4 Preferential Right of Mortgage

The preferential right of mortgage can be considered from three angles.

1.1.4.1 Property to which preferential right of the mortgage extend

The immovable property specified in the mortgage instrument together with intrinsic elements and a precise description helps to identify this immovable as provided under Art. 3064¹⁶. Some goods are considered as intrinsic element by their nature. They include all material in building bricks, roof of the house, window and doors, permanent textures, as has been expressly under Art. 1133¹⁷.

1.1.4.2 Accessories

Accessories like intrinsic elements have no distinct existence of their own. They are mutually related to another independent property¹⁸. Here Article 3064(2) creates presumption where the mortgage is the Instrument list an element as being an accessory and therefore it will fall under the mortgage.

1.1.4.3 Right to Sue for Mortgage Money

The mortgagee has the right to sue for the mortgage money in certain cases and thus obtain a money decree. Such cases are the followings;

- Where the mortgagor binds himself to repay the same;

¹⁴ Ethiopian Civil Code Article 1675 emphasized add

¹⁵ ID

¹⁶ Supra at note 21 page 100

¹⁷ Supra at note 7 page 56

¹⁸ ID

- Where without any fault of property either party, the mortgaged property is wholly or partially destroyed.
- Where the mortgagee is deprived for the whole or part of his security by reason of the wrongful act or default of the mortgagor.
- Where the mortgage being entitled to possession the mortgagor fails to deliver the same¹⁹.

1.1.4.4 Right to Rent

Where the immovable is attached after the mortgage, there is a potential conflict of interest between the creditor who initiates such attachment and the mortgagee. The mortgagee's right of priority extends to all the rent due after the date of the attachment. Furthermore, the lessees are prohibited to pay the rent to the mortgagor from the date of their notification of such attachment. They will keep these amounts towards the payment of the main debt guaranteed. If the immovable is sold the mortgagee will first be indemnified by those rents, and then from the process of the sale of the immovable²⁰.

1.1.4.5 Indemnities Generated by the Immovable

This right is raised more of the time in case of the insurance of liability compensation for deterioration of the immovable or loss. The other area is expropriation indemnity. This is supported by Article 3069 of Ethiopian Civil Code while there are exception which is mentioned under Article 3071 of the Code. The Article reads as follows:

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- 1. The mortgagor may demand that any compensation not exceeding one thousand Ethiopian dollars be paid to him.*
- 2. He may demand that any compensation be paid to him were he undertakes to use it to rebuild or repair the immovable and offers to furnish sureties or securities sufficient to guarantee that he will comply with his undertaking.*
- 3. He may in any case require that compensation he paid into the hands of a trustee appointed by the court.*

¹⁹ Cheese Man Henry, Business Law (Legal, ethical and international Environment (1992) page 220

²⁰ ID

1.1.4.6 Priority Right of Mortgages over Other Rights

sums are to be secured by the mortgage that means the amount of the proceeds of the sale of the immovable will be paid to the mortgagee before any money goes to other creditors. This is payment of the mortgagee which is considered as preferential right.

The registered amount of claim (Art. 3016)

Costs of attachment proceedings (Art. 3079) necessary expenses and insurance premiums

(Art 3078)

The legal inters within from the day immovable was attached until movable is sold by auction.

1.1.4.7 Right of improvement to mortgaged property

This right is set under Ethiopian Civil Code Art. 3066, where a mortgaged property in possession of the mortgagor has during the continuance of the mortgage, received any accession the mortgagee, upon redemption shall in the absence of a contract to the contrary; be entitled to . . . any improvement of the mortgaged, be it the main construction, extra buildings, crops or plantations by the mortgage²¹.

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Exceptions are mention in Article 3069. This presumptions is for those who were involved in the improvements, either through the suppliers they brought or by their work. Such like creditors; have here a priority over the main mortgagee²².

1.1.5 Liabilities of Mortgagee

Prescribes the right of the mortgagee in possession under right of mortgagee. He may debit the mortgagee account with the loss occasioned by his failure to perform any of the duties that are discussed below.

²¹ ID

²² ID

Management of Property:- The mortgagee must manage the property as a person of ordinary prudence would manage if it were his²³.

Collection of rents and profits:- The mortgagee must use his best endeavors to collect the rents and profits of the mortgaged property.

Payment of government revenue and other public charges:- The mortgagee in the absence of a contract to the contrary must pay the government revenue and all other charges of public nature and arrears of tend in default of payment of which the property may be similarly sold²⁴.

Make necessary repair:- The mortgagee must in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits after deducting from such rents and profits and payments mentioned in clauses, and the interest on the principal money²⁵.

Not to commit any destructive act:- The mortgagee must not commit any act which is destructive or permanently injurious to the property²⁶.

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To keep proper accounts:- the mortgagee must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee and, at any time during the continuous of the mortgage give the mortgagor, at his request and cost true copies of such accounts and of the vouchers by which they are supported²⁷.

To keep the accounts:- in the prescribed manner the mortgagee is to apply the rents and profits in discharge of the interest after deducting the following.

- Expenses incurred for the management of the property and collection of rents.
- Public charges and government revenue
- Expenses for necessary repairs

²³ Supra at note page 493

²⁴ ID

²⁵ Ibid page 495

²⁶ ID

²⁷ ID

- Interest on the amount thus spent.

1.1.6 Right of Mortgagor

The transfer of property act at any time after the principal money has become due; the mortgagor has the right, on payment or tender at a proper time and place of the mortgage money, to require the mortgagee.

- To deliver to the mortgagor the mortgage deed and all documents relating to the mortgaged property, which are in the possession or power of the mortgagee
- At the cost of the mortgagor either to retransfer the mortgage property to him or to such third person as he may direct, this right of redemption may however be extinguished by the act of the parties or decree of courts²⁸.

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Right of sell

The mortgagor of property subject to mortgage can sell the interest in property without the consent of the mortgagee. However the sale does not affect the mortgagee's interest in the property or mortgagees claim against the mortgagor²⁹. This is stated in Art 3084 of Ethiopian Civil Code, the mortgagor passes its ownership to a third party. It is such fundamental right that no provision to the contrary is admissible. So, mortgages do not obstruct sales, donations, or successions, at least in principle, in reality, the sale of a mortgaged property will be difficult, and will probably go to a far lower price than when the immovable is not encu

²⁸ Supra at note 50 page 609

²⁹ ID

Chapter Two

Formation and Effects of Mortgage

After defining mortgage, it becomes necessary to show how it is created, extinguished and then deal with its legal effects.

2. Sources of Mortgage

Mortgages are distinguished from the other by their source of creation as provided under Ethiopian Civil code Article 3041.

There are four basis of mortgage. They are

- a) Contractual
- b) Legal
- c) Judicial and
- d) Will made by the testator

2.1 Contractual /conventional/ Mortgage

Contractual or conventional mortgage as it is sometimes called is that which depends on the covenants or private agreements between two parties. It is a contract by which a person binds the whole of his mortgaged property in favors of another (creditor) to secure the execution of some other obligation, but without divesting, himself of the possession, usufruct, servitudes etc.¹ It is a very common source of mortgage because it is used generally at the creditor's wish often to secure a loan.

2.1.1 Legal Mortgage

The law alone in certain situation gives to the creditor a mortgage on the property of his debtor without being requisite that the parties should stipulate it.² It is a mortgage created specifically by law and not by the private will of the parties. It is an automatic right given to a category of

1. Civil code article 3041

2. Civil code article 3088

persons whom the law wants to protect and derived from the simple existence of a given legal situation, this type of mortgage is sometimes known as tacit mortgage, because it is established by law without the aid of any agreement.

Art 3042 and 3043 of the code give us two cases of legal mortgage. The first is to guarantee the seller for payment in event of the sale of an immovable and any obligation in the contract of sale. The second is to protect a co-partitioners, where immovable have been allocated to his co-partitioners. In condominium and communities of hereditary estates, co-partitioners are given such legal mortgage on the immovable allocate to their co-partitioners in accordance with the act of petitioners. The rational for such legal mortgage seems to lie on the presumption that one of the co-partitioner receives more than what is due to him so that he should compensate at to the others. For the excess value, it is this compensation in cash due to the others, which is secured by this legal mortgage.³

2.1.2 Judicial Mortgage

Judicial mortgage is a means for execution of a court decisions. The winning party may ask a court or arbitration tribunal to secure the execution of its decision by imposing a mortgage on his opponent's immovable assets.⁴ It is a general mortgage which the law attaches to certain judgments which condemns a debtor to secure the execution of its judgment. The judgment should specify a) the amount of the claim secured and b) the immovable or immovable to which such mortgage applies.⁵

3. Public Services of Oromia Distance Education Coordination Office (DECO), law of sales and security Device

4. Ibid

5. Civil Code Article 3044(2)

This requirement are duplication of what Article 3048 and 3045(2) Civil Code enumerate. As stated previously a mortgage, no matter how created shall have no effect unless properly registered with all its legal requirement and specifications. (3045-1)

The reason for the existence of this mortgage is the necessity of assuring in the most efficacious way possible the execution of judicial or arbitral decision. The term judicial mortgage applies to the truly so called “judicial” decision and decisions from arbitration tribunal.⁶ When a court condemns a debtor to perform his obligation, attachment to perform his obligation, attachment to his immovable property can be made at the request of the judgment debtor as to expropriate execution.

What kind of court decisions should be subject to mortgage? Should all decisions of a court whether provisional or final be subjected to mortgage?

Since there are different types of judgments it is logical to conclude that all of them do not create mortgage right. The following judgments or decisions do not carry mortgage with them. Judgments rejecting the demands or claim. Judgments referring to an arbitration, preliminary judgments which in truth are divided into provisional, preparatory, and interlocutory judgments. In general terms any judgment that does not contain any condemnation in terms of cash or in kind is not subject to mortgage. For example any judgment given for lack of jurisdiction, joined or non-joinder etc is not subject to judicial mortgage. Mortgage can be inscribed immediately even when the means of recourse suspends the execution of the judgment⁷

6. Civil Code Article 3044

7. Ibid

The moment the decision which gave rise to its initial creation is quashed reversed and remains without effect then the judicial mortgage shall be of no effect. On the contrary a judgment which becomes irrevocable and against which recourse is not possible is subject to judicial mortgage⁸.

The sentence of arbitration is a judgment under the Ethiopian law.⁹ Arbitration may be either authorized by law or a person can enter in to a written agreement to submit to arbitration. By virtue of Article 319(2) Civil Procedure Code “an arbitration award may be executed in the same form as an ordinary judgment upon the application of the successfully party for the homologation” of the award and its execution”

2.1.3 Mortgage Created by Will

Article 3041 of our Civil Code in the French and Amharic version include mortgage created by will, in other words both versions authorize that mortgage be created by will (par testament). The English version of the same article does not allow the creation or mortgage by will instead it uses the term “other private agreement”. The expression or term is vague and therefore need to be replaced but the English version is believed to have been published before the replacement of new term.¹⁰

8. Idid

9. Ethiopian Civil Procedure Code Article 315-319

10. Supera an not 3 Page 99

How can a mortgage be created by a will? Theoretically a person through a will can create a mortgage. For example Ato Abebe leaves a will stating that his four children Melaku, Jams, Sara, Ayele as heirs, He, in the will states which goes to which. By the same will he leaves an immovable situated at town I worth birr 50,000 to Melku and at the same time he allows Jams, Sara, and Ayele, a mortgage. right over the immovable.

The deceased is leaving an encumbrance on the immovable property. Melaku may either accept or reject the succession to the property. The creation of mortgage in such a way is of less practical. It also creates great problem in registration.¹¹

There can not be any mortgage without debt but in this type of mortgage the testator is creating a fictitious debt upon Melaku, in this particular example and the three heirs, Sara, ayale, Jams are creditors.

Mortgage recognizing under the French, Swiss, Italian, and Greek civil code, to which the drafter refers some times as the source of inspiration are conventional, legal and judicial ones. Creation of mortgage by will concept does not exist hence no foreign solution exists.¹²

2.2 Forms of Mortgage

2.2.1 Simple mortgage:- This is a situation where without delivering possession of the mortgage property the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that in the event of his failing to pay according to his contract, the mortgagee shall have the right to cause the mortgaged property to be sold, and the proceeds of sale

to be applied, so far as may be necessary, in payment of the mortgage money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee¹³.

11. Ibid

12. Ibid

13. Goyal, Business law Page 598

In case of foreclosure, a short produce by which mortgaged or pledged property is sold for satisfaction of an unpaid debt. The unpaid debt may be that of the mortgagor or the pledge or that of another period. Whatever the case may be the sale is applied up on the property encumbered by mortgage or pledge for payment of the debt and the property is to be sold because the debtor is in default so that the creditor have the repayment of the debt from the sale price of the property. therefore foreclosure prevent the mortgagor or pledge from regaining in property back or result the coming to an end of all his real right in the property if the debtor fails to discharge obligation to the creditor. Foreclosure although has the element of debt recovery like ordinary court execution is concerned with providing satisfaction of a secured creditor's claim prior to other creditors. This can be referred from the rules explicitly stated under Art 2857 and 3076 of the civil code, with respect to a pledge and mortgaged property.

The securities, property mortgaged or pledged gives the right to the creditor the payment of his claim out of proceeds of the sale. In preference to other secured or ordinary creditors as stated by the provision. therefore, foreclosure, apart from ordinary normal produce of execution by court serves in ascertaining the prior right of the secured creditor in satisfaction of claim the debtor. Foreclosure is thus used to materialize a real right of a person to satisfy the personal right the person has against another. ¹⁴

2.2.2 English Mortgage:- where the mortgagor binds himself to pay the mortgage money on a creation date and transfer the mortgaged property absolutely to the mortgagee, but subject to a provision that he will retransfer it to the mortgagor up on payment of the mortgage money as agreed, the transaction is called an English mortgage.¹⁴

2.2.3 Usufructuary Mortgage:- where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest or partly in payment of the mortgage-money, the transaction is called a usufructuary mortgage and the mortgage an usufructuary mortgagee.¹⁵

2.2.4 Anomalous mortgage:- a mortgage which is not simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, an English mortgage or a mortgage by deposit of title deeds within the meaning of this section is called an anomalous mortgage.¹⁶

15. supra at note page 598

16. Goyal, Business law Page 598

2.3 Effect of Mortgage

Mortgage in its nature has legal effect up on the debtor creditor and third parties .so we shall see what the legal effect of mortgage regarding these categories of person.

2.3.1 Effect of mortgage as regards the debtor

As the law say as clearly the owner of an immovable has exclusive right to transfer the ownership ¹⁷. he also has an exclusive e right to enjoy it with an usufruct ,servitude etc. ¹⁸ the owner of immovable also can administer the property, use lease, collect and consume the fruits of ¹⁹it.

Neither of parties may not stipulate that after the debt has be come due, to creditor may sell the immovable without due regard for the conditions imposed by law but they can provide that the mortgagor shall after the debt has become due ,transfer the ownership of the immovable to the mortgagee ²⁰.this prohibitive provisions conforms to the principle embodied in Article 3084 of the civil code.

2.3.2Effect of Mortgage as Regard the Creditor

The main rights of the creditor:-in the valid mortgage contract the creditor can demand the payment of the debt with in the agreed period .the requirements of the law must of corse be fulfilled, for

instance notice of non performance to put the party in default except these exceptions enumerated under article 1775 of the civil code. After putting the debtor

17 supra at note 44 page 105

18IBID

19 IBID

20 IBID

in default the creditor can demand payment in case if he fails to do so, when the creditor can have the mortgage property sold at public auction to be paid out of the proceeds of the property.

Besides the main right given to a creditor a mortgage also creates the following rights.

1. It creates right of performance ²¹
2. It creates right of pursuit ²²
3. It creates right of attachment ²³

Preference right comes in to effect when a question arises as to the determination of the order of payment to be made to persons who have mortgage right over an immovable.

Article 3059 /1 civil code establishes a general principle that “where the immovable mortgaged is attached by the creditors of the mortgageor the mortgage may demand to be paid out of the proceeds of the sale of the immovable, in priority to any other creditor payment to the mortgagee shall be made in priority to other creditors of the registered amount of the claim.

Payment that should be made to the mortgagee are

- 1- capital claim (Art 3076 civil code)
- 2- Interest not exceeding two years (Art 3077/2)

Even if specified for more than two years it shall be effective only for two years period (Art 3077/3)

- 3- Necessary expenses ²⁴and insurance premium (Art 3078 civil code)

21 Keberabe Mengestie, mortgage effect, property Addis Ababa University un
published page 21

22 IBID page 22

23 IBID

24 IBID

4- Costs of attachment proceedings.

What would happen when several creditors have a registered right on the same Immovable?

In this case the law ranks the creditors according to the date of the registration of their claim²⁵. the law clearly specifies that regard shall not be made to the date on which the claims become certain or eligible²⁶

In case of two creditors of this same debtor, there is clear competition between the creditors because they both want to exercise their mortgage rights concurrently.

The code ranks the creditors equally, but if the proceeds of the immovable is not capable of paying all of them payment shall be made in proportion to their claims.²⁷

The Ethiopian law does not make any distinction between the four mortgages. each mortgage must be registered²⁸ for instance, the buyer of an immovable is not privileged. He is a legal mortgagee and his right governed by the first registered first paid principle. The same with the right of co-practitioners and creditors who have acquired mortgage right through any of the means recognized by law²⁸

26 IBID

27 IBID page 24

28 IBID page 25

2.3.3 Right of Pursuit and Attachment

The mortgagee creditor has a right of pursuit clearly given to him by law ²⁹. the mortgagee exercises or enjoys against the subsequent purchaser right under the form of a real action. The mortgagee may demand the immovable from the purchaser as though he is the original owner. The civil code under Article 3085 states that “the mortgagee who has registered his mortgage prior to the registration of the deed evidencing the transfer may attach the immovable in the hand of the person who acquired it”

Every mortgage creditor may seize the immovable in the hands of third party purchasers. the right of the mortgagee arises from the registered right in rem on an immovable to be sold in whosoever hands it may be, as though as such rights had not been created.³⁰

Where the immovable is attached the beneficiary of the right in rem demands the value of such rights be paid to him in priority to creditors whose mortgage has been registered subsequently to his own right being registered³¹.” This article embodies a principle similar to its sub (1)(3059) but for the protection of the beneficiary

Art 3089(2) of civil code uses the word “sold” but what would happen when a person alienates his property in the form of donation exchange or legally? By definition the right of pursuit presupposes an alienation which includes sale therefore art 3089(2) should have used the word alienation rather than sale.

29 IBID

30 IBID

31 IBID

Chapter 3

3. Registration of Immovable property under the Ethiopian Law

Land has being the main source of wealth all over the world, a great deal of importance in our country the majority of the population is dependent on land for survival. Before the Ethiopian Civil Code came in to effect the ruling federal class controlled the major part of the sate .that is to mean and was not in the hand of societies. ¹

When the Civil Code comes to effect the whole thing has been changed. The Ethiopian Civil Code contains considerably many articles on property and also has significant portion under Title 10 for the registration of immovable property ².

Registration of immovable has been mentioned in different laws of our country; under general contract under sales law; under property law and in Proclamation number 334/2003 of the recent law. Their legislation Proclamation number 334/2003) under Art 5(1) imposes a mandatory condition that transected of land shall be of this proclamation should be registered to have legal effect. Unless and other wise they low strong and it has general applicable all over the country

When we see cases of having their issue on immovable property which appeared rejected because of not having been

registered their contract of agreement courts are not wrong in giving judgment using the law.

1. Ethiopian BAR Review VOL .2 No 1 August 2007 page 158
2. Mola Mengestu, registration of immovable property August 2005 Addis Ababa Facility of Law page 8

Despite the fact that the law imposes mandatory condition of registration of validity of contracts of immovable people do not register their contract of sale of immovable our Civil Cod has lived for about half a century, the legal awareness of our people with regard to registration of immovable has not yet precipitated. Of late, our courts seem determined to rigorously apply the rules. The decision court of cassation on file No 21448) is very notorious and has been agenda for current legal discussion the main themes of this case is that an authenticated contract of sale of an Immovable property can not produce legal effect Before disposition of this case failure to have a contract authenticates was not considered as a factor causing a contract of no effect but how it has been a settle rule and authentication has been one of the formality requirements for legality of a contracts relating to Immovable property.³

The fundamental objectives and the working features of registration of title to land which distinguished it land records of other types is as follows.

- A. it creates an independent title, and
- B. it cuts off the necessity for retrospective investigation of title⁴.

The object of such system is “to save persons dealing with registered land from the trouble and expense of going behind the

register, in order to investigate the history of there being author's title and to satisfy them solve of its validity.

3. Mizan law Review, Vol,2 No 1 Jan 2008 St,Mary's Universtiy college

Faculty of Law Addis Ababa Ethiopia page 96

4 Harrison c,Duning page 163

A mortgage, however created, shall not produce any effect except from the day when it is entered in the registers of immovable property at the place where the immovable mortgaged is situated.

Thus unless the contract of mortgages is registered it doesn't have legal effect.

The main problem is would the office of registration accepts all contract of mortgage?.

The reason is but most of the time we don't see when he registered contract of mortgaged which has made between natural persons because of this reason. When you assume about mortgage first come in our mind a contract between the mortgages (Bank) and the mortgagor (individual rather between individuals). The samilly the office of act and document registration may not accept registration may not accept registration of immovable not having title from municipality. This is when the parties want to make their contract of immovable in front of the said office and they reject them.⁵

3.1 Effect of Registration of Immovable Properties

Legally speaking transfer of immovables and special corporal chattels is prerequisite to register transactions that people transacted day to day in the world. Selling and buying are common practice of any society. In the process of transaction there should

be in some cases and organ, that could be persons which witnesses the transaction, even though the society respect each other .As one organ we can consider

5. Interview with

notaries I said so because people transact for example buy and sell with out the observance of witnesses, or a written agreement, especially in the center of business transaction. Actually, this is to show trust on to one another while selling and buying other forms of goods other than land or vehicles.⁶

Notaries register contracts related to immovable and some special transactions like sale of transfer of properties with regard to movable properties.

Although the law says so, the practice is different A Possessor of property (immovable) have no security unless it is registered. For example it doesn't it have title. Possession presupposes ownership and transaction will be simply give and take even if a property doesn't have title deed. The transaction may have selling value but may not transfer valid ownership title as required by law.

When we come to immovable there are requirements to say certain property is validly or legally transferred .One of this can be contract, there should be a written agreement attested by witness as listed under article 1723. This form requirement serves a purpose of proof for both contracting parties.⁷ .

6. Ibid
7. Supra at note 1 page 160

3.1.2 Practical Problems of Registration

Problem emerged recently as to whether contract of sale of immovable should be registered to have effect on third parties or to bind the parties themselves. This is because there was practice by courts giving effect (enforcing) contract that are not registered. If a registration mandatory to bind the parties and affect third parties, the practice of courts invalidating unregistered contract in connection with immovable shall be followed intimately by all courts. The recent decision reversing the decision of the Federal High Court and the supreme court by the court of cassation invalidation unregistered contracts relating to immovable shall serve an example to the public the decision of the court of cassation Saying unless registered a contract of transfer of immovable will not bind the parties or do not be considered as a contract the contract will be void. ⁸.

Once registered means the document is know to the public is made. It creates the assumption that the public a ware of the creation of the contract. That is the main purpose of registration giving evidence to interested third parties. Moreover, it guards against mischief or fraudulent act so that they will not happen where third parties have known the existence of a certain contract concerning immovable property.

The main purpose of meeting evidentiary nature of registered document is to protect third parties from having contract with the same property

8. Proclamation 454/1997 Article 2(1)

Verdict ion federal Supreme Court cassation Bench F .No 21448

and with the same objective. The Supreme Court of Cassation branch in the case of W/ro Gorfe G/hiwot vs Aberash Dubarg ,Getachw Nega, pronounced its judgment invoking Article 1723(1) of the Civil Code where a contract crediting or assigning rights shall satisfy two requirements in order to be valid. The first requirement relates to written form.

The second is that it should be registered with a court or notary. Since a contract of sale is one of the ways through which a right of ownership is transferred ,it is included within the ambit of this provision ,as a result, a contract of sale of an immovable can only be valid if both the requirements as to writing and registration before a court or notary are satisfied ⁹

The main task of notary is authentication. The provision of Article 1723 (1) is to show the procedure of authentication. On the other hand the provision of Article 2878 has shown the registration of 3rd parties have known the existence of a certain construct concerning immovable property which known judicial acts.

Sale of immovable property such as house is listed under the civil code specially articles which govern sale of immovable property art Article 1723, 2877, 28,78.

As we clearly see from Article 2877 and 2878 of our civil code the first Article 2877 states requirement for the existence of contract between the parties it should be made in writing ¹⁰.

9. Supera at note 1 page 196

10. Ethiopian Civil code 1960 Article 1723

The next Article 2878 states instance for a contract to be binding on third parties or in other words it says for a contract to be binding on third parties it should be registered ¹¹ “. Registration must be at the place where the thing is situated.

The other purpose is that it makes contract, binding and effective. To the parties themselves. The party in dispute may raise the registration of documents as evidence, that is to say a certain contract concluded and registered in front of authorized authority then it will bind between the parties and it will be effective too. Even though general contract provision says this, it doesn't answer the question what would happen to parties contract which is not registered ¹².

If a certain title is registered then it will make the public be aware that the specific property owned or acquired by the person listed on the title deed belongs to the person whose name is registered. Once a title deed is given to a person and registers there are other titles may not appear on similar property.

To day the value of land is highly increasing because of this contracting parties most of the time the seller refuses to be bound by the contract when he knows that the contract is not registered. This has become the practice especially after the supreme court

cassation bench render its decision. Many cases appear before the court in connection with this problem, where the parity refused to honor the contract for instance the following disputes between contracting parties are decided by courts ¹³.

11. Ethiopian civil code 1960 Article 2878

12. Supera at note 1 page 164,165

13. Case between Ato Teshome VS Dr Solomon

An appeal case file No 36354 Federal High Court

- Ato Teshome W/Eyesus vs Dr Solomon Desta
- Engineer Mohamed Umer vs W/ro

An appeal case File No 53581 Federal High Court

1. Shewaye Burck Desaleg
2. Ato tatek Belayneh
3. Ato Hailu Belayneh
4. W/rt Yeshe Belayneh

An appeal case Federal superime court File No 26443

Ato Abebe Bengna herditors and wife

1. w/ro Arpa telila
2. Tesfaye Abebe
3. Teshome Abebe
4. Alemu Abebe
5. Thelahun Abebe vs
6. Ato salla Hassen

The issue and the merit of the hole cases are as follows the dispute is raised based on selling of immovable property. There is an agreement between parties. But the agreement of the contract is not concluded by for notary or court. On the other hand is not registered, when the one contracting parties asks to enforce the contact the court refuses the question of parties to enforce the contract based on the decision of cassation bench which rendered

the contract of immovable property unless registered will not be binding.

In all cases the courts tried to see on the issue of whether a contract exists or not. In other words the requirement of contract of sale, stipulated by general contract provision or disregarding special sale law of the civil code. If a contract on sale requirement of registration is not met then the contract is considered as a mere draft as to the recent practice in those cases we can see the contract where not registered and not authenticated by court or notary.

When see general contract part of the civil code which talks about form requirement of sale mortgage, etc of immovable properties we can get Art 1723.

We can say from the diction of courts that the registration is favoring one party only out of a contract of sale of immovable or in other words a bad faith party may contract out to sale his property immovable and knowing that registration is a criteria for the validity of sale of immovable.

If we accept the rule of interpretation of laws that supports the special prevails over the general, there is no reason why a contract of sale of both immovable or movables concluded according to terms of special contracts will be rendered invalid due to non-registration. From their point of view one can oppose the judgment passed by the court of cassation of our Federal government to have missed the standard and correct interpretation of laws.

Conclusion and Recommendation

Mortgage is a guarantee in immovable property which is not delivered to the creditor and giving the right in case of non-performance of the guaranteed obligation to be paid with the value of such property to the extent of the credit secured by the mortgage.

The creditor provided with mortgage security no longer has to fear the effect of non payment by his debtor .It gives him a real right of action. As between creditors secured by mortgage right, they rank in the order of registration.

Registration is a well known practice of countries now a days. As the name indicates it is a system of filing act or documents and titles in the proper office of the government. Owners register their titles or documents in the government offices (notaries). This office have the powers to authenticate and register these transactions.

For a long time in Ethiopia formality requirement of contract relating to immovable properties was in confusion as to whether registration of the contract serves as formality requirement or not in the Ethiopian civil code. Recently we got our law “ready Made” and grownup. This was obviously of advantage to the recipient in many respects. However it is not controvertible that full advantage could not be obtained due to lack of complementary work by way of doing follow up of the law. From this formality requirement is the biggest problem for a long time through a country. Before the Supreme Court cassation bench passed judgment. Some courts in Ethiopia consider registration of contract relating to immovable properties as formality requirement and declare the contract is void. If contracts have not complied with registration requirements, however others do not accept this and consider registration as a means of publicity and argue that non compliance with registration does not render a contract in valid.

This confusion is created as a result of non- operation of the Civil Code which deals with registration of immovable properties and as a result of the mandatory nature of Art 1723 of the Civil Code which require both writing and registration of a contract relating to immovable properties as formality requirement Therefore, this writer agree with the decision of Cassation bench. It has not been easy to receive and assimilate the laws and to take the best advantage of their ready made nature as well as the fact that they were taken from well developed societies. Our society would also develop at a faster pace, similarly the contract related to immovable property going up smoothly. From the standing the rational behind Article 1723 and 2878 registration must be considered as formality requirement.

However as mentioned earlier after the judgment of cassation bench declare contract of immovable property unless registered it will be considered mere draft (%S''A' "<M). Registration becomes mandatory to say contract of transfer of title to be valid. The principle "contract is a law between the parties" is become questionable become unworkable. The problem becomes visible in the past few years. Contracts of transfer of immovable which are registered, just because they appear before and after judicial review, judges render different decision. From standing this the knowledge of contract in related to immovable highly eradicate on different view through the society. Even between lawyers, so writer recommend the cassation bench it should be re amend the verdict ion at list through put exception for the contrasts were made before the bench declare the contract is in valid.

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responsibility for any failure to observe the conventional rules of citation.

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Signed_____



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